IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 139

MISSISSIPPI VALLEY BARGE LINE COMPANY,

Petitioner,

versus

ESSO SHIPPING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ALFRED M. FARRELL, JR.,
Of Counsel.

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Esso Shipping Company respectfully submits that the true questions presented herein do not warrant a review by this Court. The case at bar is one arising out of a collision between two vessels which case was litigated and the liability decided on the particular facts of the case which decision was subsequently affirmed by the Court of Appeals.

QUESTION PRESENTED.

The District Court found as a fact that the collision occurred when the up-bound Tug *New Orlean* with flotilla improperly and negligently crossed the center line of the Mississippi River into the wrong side of the channel while

negotiating a bend. The Court of Appeals accepted this finding of fact. Counsel for petitioner apparently agrees with this result when he states at page two of his petition: "There can be no dispute as to the facts since they were found by the District Judge and accepted by the Court of Appeals."

The District Court found that when the *New Orleans* flotilla crossed onto the bend side of the river it was in violation of a custom of the Mississippi River of such long standing as to have the force of law. This custom provides that up-bound vessels proceed upstream under the point and that down-bound vessels proceed down in the bend. Accordingly this particular passing required each vessel to stay on its own right hand side of the channel. The Court of Appeals agreed that the *New Orleans* flotilla was at fault for its failure to proceed in accord with this custom. Counsel for petitioner again agrees when he states: "Accepting, as we must, that the *New Orleans* was at fault for having crossed the center line of the river, . . ." On these facts the Court of Appeals concluded "that the negligence of neither vessel was wholly sufficient to account for the accident, from which it follows that the damages should be divided." (Appendix to petition, P. 17)

Consequently, the question presented is simply whether the conceded fault of the *New Orleans* flotilla in failing to navigate the point side of the Mississippi River was a contributory cause of the collision with the SS *Quemado Lake*.

Reasons for Denying the Writ.

1. The issue in the present case is uniquely narrow since all cases involving causal connection between the fault and the collision must be judged on their own particular facts. Consequently, the decision of the Court of

Appeals can have no effect on anyone apart from the litigants.

2. The decision of the Court of Appeals is clearly correct and presents no conflict of decision. Counsel for the petitioner concedes the fault of the *New Orleans* flotilla and the application of the so-called "Pennsylvania Rule" derived from this Court's opinion in *The Pennsylvania*, 86 U. S. 125. He contends, however, that the Court of Appeals felt bound to a strict application of the Pennsylvania Rule and failed to follow the so-called "modern trend" of some courts to liberalize its application. In support of the "modern trend" of cases, counsel for petitioner cites *Seaboard Tug & Barge* v. *Rederi AB/Disa*, 1 Cir., 213 F. 2d 772, where the Court said:

> "We cannot believe that the Supreme Court in The Pennsylvania intended to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote."

This statement with respect to the Pennsylvania Rule was followed by the Fifth Circuit in the cited cases of *Compania De Maderas, etc.* v. *The Queenston Heights*, 220 F. 2d 120 and *Koch-Ellis Marine Contractors* v. *Chemical Barge Lines*, 224 F. 2d 115.

The Court of Appeals in the present case held that *the negligence of neither vessel was wholly sufficient to account for the accident.** This conclusion can admit of no other interpretation than that the collision was caused by the contributory faults of the SS. *Quemado Lake* and the *New*

* Italics ours.

Orleans flotilla. The Court of Appeals does not suggest that the damages must be divided because the *New Orleans* flotilla did not overcome the burden of establishing that its failure to navigate the point side of the river could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote. Judge Holmes, who wrote the opinion of the Court of Appeals, disagreed with the majority not because the latter improperly stated the Pennsylvania Rule but on the grounds that he did not agree that the fault of the *New Orleans* was a contributory cause of the collision.

Counsel for petitioner concludes his argument by attempting to assert a conflict between the present case and a line of cases holding a steamship solely liable for a collision with an encumbered tug. To sustain such a conflict it must be shown that the cited cases stand for the proposition that the rules of the road and customs having the force of law do not apply to encumbered tugs. The cited cases state no such proposition despite petitioner's zealous efforts to create such an allusion. Petitioner has done nothing more than bring to the attention of this Court cases establishing sole fault on the part of a steamship where the facts peculiar to those cases showed no contributory fault on the part of the encumbered tug.

3. Petitioner has already received an appellate review of his case and offers no worthwhile reason for the granting of this petition. He has not shown any conflict of opinion nor has he even attempted to show that the issue is of any importance to warrant review by this Court. In *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision

between those Courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. *The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*"*

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND T. GREENE,
Counsel for Respondent.

STEPHEN J. BUCKLEY,
ALFRED M. FARRELL, JR.,
of Counsel.

July 11, 1957.